the process be termed merger or not. The denial of merger is inconsistent with the recognition of the effective operation of a release.

In a recent South Carolina case, *Vaughn* v. *Sanford* (S. C. 1908) 62 S. E. 316, a father had conveyed a conditional fee to a daughter, who died after him without issue. In defense to an action by his heirs to recover the property, it was alleged that the daughter as residuary devisee had taken the possibility of reverter, which merged with her estate making it a fee simple. The court decided the case on the short ground, however, that the possibility of reverter is not an estate, is neither descendible nor devisable. It was further held that had there been an attempt to devise the possibility specifically, such an attempt could not operate as a release, on the curious ground that the moment of the testator's death, the possibility of reverter passed to his heirs, and there was nothing left on which a release could operate. The dictum might be more properly sustained on the ground that a release operates only *inter vivos* and *in praesenti*, and cannot be put in testamentary form.

POWER OF A RECEIVER TO ISSUE CERTIFICATES IN THE CASE OF PRIVATE CORPORATIONS.—That courts of equity have the power in the case of public and quasi-public corporations, to displace prior liens on the corporate property, is a proposition which today admits of no doubt.[1] Whether this power should be extended to private corporations is, however, still an open question in most jurisdictions, in the determination of which it is necessary to ascertain whether there lies at the basis of the doctrine as applied to public corporations any rational principle which will apply equally to private corporations.

In two ways the courts have permitted a receiver to displace prior liens. (1) Debts incurred by the corporation in the operation of the road prior to the receivership may be made prior liens on the income, and, if that be insufficient, on the *corpus* of the property.[2] This is confined solely to public corporations because of the public necessity[3] of continuing operations, and, before such a debt will be given priority, it must appear that the income, which should have been applied to the debt, was diverted to the benefit of the lienholders.[4] (2) The issuance of receivers' certificates to borrow money for the preservation of the property, and, when necessary, for the operation of the company.[5] As far as regards the relation of the receiver to the corporation, this method of burdening the property differs radically from the first. In the first the court merely determines the order in which the corporation shall pay its debts. In the second the court creates the debt and places the liability on the assets of the corporation. By the appointment of a receiver *pendente lite*, a corporation is not dissolved.[6] The title to the corporate property is not affected,[7] nor is the receiver an

[1] 7 COLUMBIA LAW REVIEW 627; Wallace *v.* Loomis (1877) 97 U. S. 146.
[2] Fosdick *v.* Schall (1878) 99 U. S. 235; Wood *v.* The Guarantee Trust Co. (1888) 128 U. S. 416; *contra*, Metropolitan Trust Co. *v.* Tonawanda Valley R. R. (1886) 103 N. Y. 245.
[3] Fidelity Ins. Co. *v.* Shenandoah Iron Co. (1889) 42 Fed. 372; Wood *v.* The Guarantee Trust Co., *supra*.
[4] Gregg *v.* Metropolitan Trust Co., (1904) 197 U. S. 183; but see Farmers' Loan & Trust Co. *v.* Kansas City etc. R. R. (1892) 53 Fed. 182.
[5] 7 COLUMBIA LAW REVIEW 627.
[6] State *v.* Merchant (1881) 37 Oh. St. 251; Beach, Receivers §406.
[7] Chicago Union Bank *v.* Kansas City Bank (1889) 136 U. S. 233 at 236.

agent of the corporation to bind it by his acts or contracts.[8] But, since the court has taken the property into its custody to do all things necessary for its conservation, the receiver of the court becomes, in a sense, the representative of the fund in his hands, and, as such, may bind the fund.[9] Thus his torts and contracts for operating expenses are not personal liabilities of the receiver, but liabilities of the fund.[10] There is, therefore, no reason as between the corporation and the receiver why he should not have the power to bind the property by receivers' certificates.

In considering the power as against the bondholders to displace prior liens, it is to be noticed that in the majority of cases the courts find that the bondholders are precluded from objecting because the mortgage trustee, as their representative, has consented to the issuance of certificates.[11] In the absence of express authority given the trustee in the bond and mortgage, it is difficult to understand how his consent in such a matter can affect the bondholders. The trustee has no power to encumber the trust property by an agreement out of the court,[12] and, save for practical considerations, there is no reason why he should be allowed to do so by an agreement in court.[13] Owing, however, to the difficulty of getting the bondholders before the court and the necessity that immediate steps be taken to raise money for the preservation of the property and the continuance of the business, the court seems justified in inferring that a bondholder impliedly assents to the trustee's acting in his interests in all matters connected with the winding up of the corporation. But the courts have also authorized the issuance of certificates when the trustee's consent could not be obtained.[14] This power cannot be supported on any logical principle. It is true that the necessary incidental expenses of a receiver have priority over all other claims,[15] but the principle applicable here is similar to that principle which requires that the expenses of executing a trust be paid from the trust fund before its distribution. Such a power to impair the obligation of contracts can be supported only on grounds of public necessity.

The issuance of certificates in order to keep a company in operation has never been sanctioned in the case of private corporations unless the prior mortgagees and bondholders consent,[16] and where necessary to preserve the mortgaged property, there is a tendency to require more than the constructive assent of the mortgage trustee.[17] But some courts have permitted certificates to issue without consent when necessary to preserve the property.[18] Thus in a recent case decided by the Court of Chancery

[8]Godfrey *v.* Ohio etc. Ry. Co. (1888) 116 Ind. 30; Heath *v.* The Missouri etc. R. R. Co. (1884) 83 Mo. 617.

[9]Vanderbilt *v.* The Central R. R. (1887) 43 N. J. Eq. 669.

[10]Vanderbilt *v.* The Central R. R., *supra*; Anderson *v.* Condict (1899) 93 Fed. 349.

[11]Kent *v.* Canal Co. (1891) 144 U. S. 75.

[12]Hollister *v.* Stewart (1889) 111 N. Y. 644.

[13]Duncan *v.* Mobile etc. R. R. (1876) 2 Woods 542; see Beach, Receivers §§393, 394.

[14]Meyer *v.* Johnston (1875) 53 Ala. 237; *semble*, Vilas *v.* Page (1887) 106 N. Y. 439.

[15]Howe *v.* Harding (1890) 76 Tex. 17; see Hooper *v.* Central Trust Co. (1895) 81 Md. 559 at 591.

[16]International Trust Co. *v.* Decker Bros. (1907) 152 Fed. 78; U. S. Investment Co. *v.* Portland Hospital (1902) 40 Ore. 523; Belknap Savings Bank *v.* Lamar etc. Co. (1901) 28 Colo. 326.

[17]Fidelity Ins. Co. *v.* Roanoke Iron Co. (1895) 68 Fed. 623; Farmers' Loan & Trust Co. *v.* Grape Creek Coal Co. (1892) 50 Fed. 481; Belknap Savings Bank *v.* Lamar etc. Co., *supra*.

[18]Karn *v.* Hickson & Rorer Iron Co. (1890) 86 Va. 754; Porch *v.* Agnew Co. (N. J. 1904) 57 Atl. 546.

of New Jersey, it was held that a receiver might issue certificates, the mortgage trustee assenting, to pay insurance premiums and also, the mortgage trustee objecting, to pay interest on a mortgage about to be foreclosed. *Lockport Felt Co.* v. *The Box Board Co.* (N. J. 1908) 70 Atl. 980. The same reasons of practical necessity, it is submitted, require that the trustee should represent the bondholders in the case of private, as well as in the case of public. corporations, with this difference; when an individual buys the bond of a public corporation he realizes that the needs of the public will require its continuous operation, and the trustee's authority to consent to the borrowing of money for this purpose may be implied;[10] but in the case of private corporations it would be unjust to imply such extensive authority, and his power to bind the bondholders should be restricted to those cases where the displacement of prior liens is necessary to preserve the property, and, since the interests of creditors alone are at stake, and no public interest, the court has no right to substitute its judgment for that of the lienholders or their representative.

RIGHTS IN THE FORESHORE.—Upon the nature of the ownership of the foreshore must largely depend the nature and extent of rights therein. In England, the *prima facie* title is conceived to be in the Crown, and although the origin of this conception has been viewed with suspicion[1] and its soundness severely questioned,[2] it has largely determined the foreshore rights. This proprietary interest in the Crown, the *jus privatum,* is subject to the public right,[3] the *jus publicum,* which comprehends the right of navigation and fishing and rights incidental thereto such as anchorage for a reasonable time and passage along the shore within reasonable limits.[4] That it did not include the right of bathing or unrestricted passage along the shore was established in *Blundell* v. *Catterall.*[5] That the right of fowling is not a part of the *jus publicum* has been held within the past year.[6]

In the United States the property status of the foreshore is difficult to determine. In Massachusetts by the Ordinance of 1647 the upland owner takes the fee with reservation to the public of the rights of navigation, fishing and fowling, but not of bathing.[7] The law of Maine is based upon the same Ordinance, while in Washington the fee is in the upland owner by constitutional provision. Where the matter has been judicially determined, as has been done in the majority of the states, it has been generally held that the title does not pass to the upland owners, but remains in the state[8]. The general tendency appears to be to give the greatest possible beneficial enjoyment of the foreshore, although differing conceptions of the nature of the State's ownership have been taken, materially affecting the extent of public rights. Concerning the State's title there

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[10]International Trust Co. *v.* Decker Bros., *supra.*

[1]Farnham, Waters and Water Courses, 182.
[2]Moore, Foreshore and Sea Shore (3rd Ed.) 181-668.
[3]Parmenter *v.* Atty. Gen. (1811) 10 Price 378.
[4]Fitzhardringe *v.* Purcell (1908) 77 L. J. 529.
[5](1821) 5 B. & Ald. 268.
[6]Brinckman *v.* Matly L. R. [1904] 2 Ch. 213.
[7]Buller *v.* Atty. Genl. (1907) 195 Mass. 79.
[8]Farnham, Waters and Water Courses, 209. To this rule, Pennsylvania and Delaware are the most notable exceptions. Tinicum Fishing Co. *v.* Carter (1869) 61 Penn. St. 21; Hartly & Hollinsworth Co. *v.* Paschall (1882) 5 Del. Ch. 435.